IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	

STANDBY COUNSEL'S REPLY TO GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S *PRO SE* PLEADING ENTITLED "REDACTION TO COVERUP THEIR LIES"

COMES NOW standby counsel in reply to the *Government's Response in Opposition to Defendant's Pro Se Pleading Entitled "Redaction to Coverup Their Lies"* ("Response") and in support of the *pro se* defendant's motion (docket # 821).[1]

OVERVIEW

In summary, narrowly focusing on Mr. Moussaoui's specific request, Mr. Moussaoui should be allowed access to any information voluntarily disclosed by the government at the January 30, 2003 hearing under 18 U.S.C. App. 3 ("CIPA") concerning its new theory of the case (*i.e.*, the Government's embrace of a fifth plane theory and disavowal of its 20th hijacker theory).[2] Those portions of the transcript where the theory is addressed, appear to be classified. *See* Transcript of Jan. 30, 2003 hearing at 21-26, 62-64.

---

[1] In his motion, *The Silence of the PIG Starring Dunham the Megalo* (filed Apr. 16, 2003) (docket #838), Mr. Moussaoui demands that standby counsel weigh in on the issues raised by Mr. Moussaoui's motion to which this government response is addressed.

[2] There is nothing to prevent today's discarded theory from being the one ultimately advanced. So the fact that the government is now dismissing the 20th hijacker theory does not mean it will never surface again. Indeed, it is such a simplistic and obvious theory that the defense must prepare to debunk it because it could be convincing to a jury even if not advanced by the prosecution. Access to *Brady* information should therefore not be conditioned upon the government's current view of its theory of the case.

While ordinarily an uncleared defendant may not be able to compel disclosure of information concerning the prosecution's theory or receive classified information, there are two reasons why Mr. Moussaoui, as his own counsel, is entitled to that information here. First, as a tactical decision, the government voluntarily chose to reveal its theory in proceedings closed to Moussaoui in an effort to defeat a pretrial motion by him. Second, Mr. Moussaoui will need access to the information in order to fully vindicate his *Faretta* rights[3] in CIPA § 6(c) proceedings recently ordered by the Court of Appeals.

More broadly, in an April 4, 2003 Order prompted by Mr. Moussaoui's motion, the Court found merit in Mr. Moussaoui's complaint that he had been denied access to the government's on-the-record remarks about its theory of prosecution and suggested that the level of secrecy in this case may be infringing upon Mr. Moussaoui's fundamental Sixth Amendment right to a public trial. The Order directed the government to address this issue in response to Mr. Moussaoui's motion as well. Now, as a result of a subsequent April 14 Order of the Court of Appeals directing this Court to conduct CIPA § 6(c) proceedings with regard to information this Court has already determined to be *Brady*, the Court's concern over the level of secrecy should, respectfully, expand to encompass Fifth Amendment concerns as well.

Mr. Moussaoui is a *pro se* defendant entitled to shape, organize, control, and participate in his own defense. The government has continuously supported Mr. Moussaoui's efforts to assume the role of being his own counsel and has done so purportedly to protect his rights, not to

---

[3] *See Faretta v. California*, 422 U.S. 806 (1975).

take grim advantage.[4] Having done so, the government cannot turn a blind eye to the obvious problem this poses. That is, the clash between the need to protect national security information which includes core *Brady*, and an uncleared *pro se* defendant who has a constitutional right to that information in order to defend himself.

The government blithely tries to blink away problems with Mr. Moussaoui's inability to gain access to classified information by saying he waived much more than his right to counsel when he exercised his Sixth Amendment right to represent himself. Specifically, the government says that because he waived his right to see national security information as part of the colloquy predicate to granting his request to proceed *pro se,* "the defendant cannot now complain about the denial of his access" to that information. *See* Response at 7.

Whatever rights the defendant is alleged to have waived in the process of endeavoring to exercise his *Faretta* right to self-representation last July, there are two rights he clearly did not waive. The first is the very right he was endeavoring to exercise, *i.e.*, the right to represent himself. The second is the right all other rights are intended to guarantee and which thus cannot be waived, *i.e.*, the right to a fair trial. The defendant cannot vindicate either one of these rights if he is not allowed access to (1) the classified *Brady* information giving rise to the upcoming CIPA § 6(c) substitution proceeding, and (2) any government proposed substitutes. Without the former, he will have no baseline to determine whether the latter will provide him with an acceptable substitute.

---

[4] *See Government's Position on Competency and Defendant's Self Representation*, (filed June 7, 2002) (docket #163) supporting Mr. Moussaoui's request to represent himself. Since that time, the government has not suggested that there should be any change in Mr. Moussaoui's status.

The government would like this Court to believe that there is nothing new or unique here, just a typical CIPA case, with no "cause for alarm." Response at 9. But there is something new and unique here. In this case, we have an uncleared, *pro se* defendant and proceedings that could perhaps lead to a substitute for *Brady* information that the *pro se* defendant has never seen. It is Mr. Moussaoui's right to meaningfully participate in this process, as the Order from the Court of Appeals seems to expect, that sets this case apart and requires a more comprehensive answer than the government provides to the Court's concerns about excessive secrecy.

DISCUSSION

I. BACKGROUND

On June 13, 2002, this Court granted Mr. Moussaoui's motion to proceed *pro se*. At the time, the Court informed Mr. Moussaoui that, acting as his own counsel, he would not have access to national security information that could be relevant to his defense. *See* Transcript of June 13, 2002 hearing at 35. Subsequently, Mr. Moussaoui filed motions for access to certain evidence which turned out to be national security information. Standby counsel filed papers in support of Mr. Moussaoui's motions.

On January 30, 2003, this Court held a closed CIPA hearing at which national security information sought by Mr. Moussaoui's motions was addressed. Mr. Moussaoui, although both defendant and counsel, was denied access to the information and excluded from the hearing because he does not have a security clearance. Subsequently, this Court issued a Memorandum Opinion on March 10, 2003 ("Memorandum Opinion"), ruling on the matters discussed at the January 30 hearing. It determined that some of the national security information at issue was significant to the trial of this case and granted Mr. Moussaoui access to some of the classified

information he had been seeking. No access has yet occurred as matters relating to this issue have been stayed pending an appeal. Further, the Memorandum Opinion was classified and could not be given to Mr. Moussaoui. Ultimately, Mr. Moussaoui was given a declassified version of the January 30 hearing transcript. It was heavily redacted so as to make it almost meaningless. Mr. Moussaoui also was given a heavily redacted declassified version of the Memorandum Opinion which is the subject of the currently pending appeal.

In his subsequent motion, *Redaction to Coverup Their Lies* (filed Apr. 3, 2003) (docket #821), Mr. Moussaoui complains that he learned quite by chance of what he perceives as a shift in the government's theory of the case against him. He says the government has moved from the so-called "20th hijacker theory to a new theory of a 5th plane going to the White House."[5] His

---

[5] The government denies this "shift" in theory. It does not deny that it is now pursuing a fifth plane theory, but instead contends that it never described the defendant "in the indictment" or in "any pleading" as the "20th hijacker." Response at 5. The "20th hijacker" theory embraces the notion that Mr. Moussaoui was to have been the fifth hijacker on the fourth plane, Flight 93, which went down in Pennsylvania with only four (4) hijackers on board. The total number of hijackers would thereby have been increased to twenty (20), a symmetrical five (5) each on four (4) planes. While it may be true that Mr. Moussaoui has not been described in any "indictment" or "pleading" as the "20th hijacker," this theory certainly has been described and publicly embraced by high ranking government officials from the outset, *e.g.*,

(1) Vice President Cheney disclosed that Mr. Moussaoui was to have been part of a team that hijacked the 9/11 plane which crashed in Pennsylvania. Martin Fletcher, "*Hijacker" Was Arrested Before Plane Attacks*, Times Online, (Oct. 13, 2001), *available at* http://www.timesonline.co.uk/article/0,,46-126109,00.html.

(2) "Federal officials say Zacarias Moussaoui may have been the 20th terrorist . . ."

"Federal officials as high up as Vice President Dick Cheney said they believe Moussaoui was an intended member of suicide hijacking teams, and that his absence may have been the reason why only four terrorists took over United Flight 93 instead of five on board the other hijacked airliners." Jim Parsons, *Team 4: Fifth Flight 93 Hijacker Could Be in Jail*, (Nov. 6, 2001), *available at*

(continued...)

[5] (...continued)
http://www.thepittsburghchannel.com/team4/1055798/detail.html.

(3) "Investigators believe [Richard Reid] became involved with al Qaeda . . . upon meeting Zacarias Moussaoui, the suspected 20th hijacker . . ." Deborah J. Daniels, Assistant Attorney General of the United States, Remarks at the National Criminal Justice Association Forum, (July 29, 2002), *available at* http://www.ojp.gov/aag/speeches/ncjaluncheonspeech.htm.

(4) "Zacarias Moussaoui, the alleged 20th hijacker . . ." Tom Ridge, Director of Homeland Security, Remarks to the Electronics Industries Alliance, Washington D.C. (Apr. 23, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/04/print/20020423-15.html.

(5) "Zacarias Moussaoui was training to be the fifth hijacker on the flight that crashed in Pennsylvania." J. T. Caruso, Deputy Assistant Director, Counter-Terrorism Division, FBI, Statement for the Record Before the House Intelligence Subcommittee on Terrorism and Homeland Defense, (Oct. 3, 2001), *available at* http://www.fbi.gov/congress/congress01/caruso100301.htm.

(6) Question: "Mr. Director, was he the 20th hijacker . . . or not?

Mr. Mueller, the FBI Director, responds by suggesting Mr. Moussaoui was a replacement for Binalshibh:

Mr. Mueller: "Well, I think if you parse the indictment you will see that Binalshibh attempted four times to come into the United States and was rejected on those occasions. Subsequent to the fourth time he was rejected, you will see Mr. Moussaoui attempting to come into the United States."

Mr. Mueller, FBI Director, News Conference (Dec. 11, 2001), *available at* http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks12_11.htm.

And the President then identifies Binalshibh as the 20th hijacker who, according to Mueller, Moussaoui was to replace:

President Bush: "Binalshibh popped his head up. He was the guy that thought he was going to be the 20th hijacker and wanted to be."

(continued...)

motion seeks access to the redacted information from the January 30 hearing transcript related to the new 5th plane theory. Mr. Moussaoui points out that it was only due to an inconsistency in the redaction process between the transcript of the January 30 hearing and the Memorandum Opinion that he even learned of the 5th plane theory. However, Mr. Moussaoui, without some relief, cannot have an unredacted transcript because it is classified and he does not have a clearance.

In its April 4, 2003 Order, this Court found merit in Mr. Moussaoui's complaint. The government was directed to respond to Mr. Moussaoui's motion. Instead of limiting its focus to the particular issue raised by Mr. Moussaoui, the Court addressed a concern more global in nature, *i.e.*, "the extent to which the United States intelligence officials have classified the pleadings, orders, and memorandum opinions in this case." The Court was openly skeptical "of the Government's ability to prosecute this case in open court in light of the shroud of secrecy in which it seeks to proceed."

Thereafter, on April 14, 2003, the Court of Appeals directed that the Court provide the government an opportunity to propose substitutions for the classified information authorized to be disclosed as a result of Mr. Moussaoui's motions and to provide " the *defendant* and standby counsel . . . an opportunity to respond to any proposed substitutions". Order at 1 (filed Apr. 14,

---

[5] (...continued)
President Bush, Remarks at Bob Beauprez for Congress Luncheon (Sept. 27, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/09/print/20020927-3.html.

Accordingly, it is not unreasonable for Mr. Moussaoui to believe that the government has shifted its theory.

2003) (*emphasis added*). On that same day, the government responded to Mr. Moussaoui's motion.

II. THE GOVERNMENT'S RESPONSE TO MR. MOUSSAOUI'S MOTION AND THE COURT'S APRIL 4 ORDER

In response to Mr. Moussaoui's motion, the government barely addresses this Court's seriously expressed and justifiable concerns regarding the extensive "shroud" of secrecy surrounding this case. The government sets up several straw men in an obvious effort to obscure the fact that it has avoided addressing the issue raised by Mr. Moussaoui and amplified by this Court's Order. The questions are not, as the government would like them to be, abstract propositions as to whether or not (a) the indictment provides adequate notice, Response at 1; (b) Mr. Moussaoui has received generous discovery, Response at 1; (c) the existence of classified information as part of discovery is unique, Response at 1-2; (d) Mr. Moussaoui is entitled to a preview of the government's theory of the case, Response at 2-5; or (e) the evidence the government intends to introduce to support the charge is unclassified, Response at 6-8. These are distractions which divert attention from the government's failure to directly and fully address the issue of excessive secrecy[6] and the inconsistent manner in which the need for secrecy is invoked. The government barely addresses these issues in its response and certainly offers no solution to problems with protecting the defendant's rights to a fair and public trial that by now, should be obvious to everyone.[7]

---

[6] In describing the secrecy as "excessive," we do not mean to imply that it is unnecessary from a national security standpoint. We are in no position to make such a judgment.

[7] This is not surprising given the government's startling admission in a death penalty case as to their view of the role of the prosecution. They say that the case involves "the

(continued...)

III. ARGUMENT

A. Mr. Moussaoui Must be Given Access to the Information Necessary To Meaningfully Participate In the Upcoming CIPA § 6(c) Proceedings Even Though They Are Classified Because He Has Not Waived Either His *Faretta* Right or His Right to A Fair Trial

The Court of Appeals has ordered CIPA § 6(c) proceedings. Its Order appears to contemplate participation in these proceedings by Mr. Moussaoui. In order to have a fair opportunity to participate effectively in these proceedings, Mr. Moussaoui needs access to certain minimum essentials. These are: (1) any proposed substitute, (2) the information which the substitutes are being offered for, and (3) the government's theory of its case as advanced at the hearing on January 30. Mr. Moussaoui needs this information in order to accurately assess whether any proposed substitute is the substantial equivalent to the *Brady* information it is being substituted for and to frame his arguments in opposition to any substitute which he thinks does not meet that test. He cannot have two of these three because they are classified and likely will not have the third if the government substitutes are classified.

In general, because we are approaching an issue (the adequacy of proposed substitutes) that goes directly to how the defense will be permitted to present its case at trial, denial of full participation in this process to Mr. Moussaoui denies him his *Faretta* right at its core, *i.e.*, control

---

[7] (...continued)
balancing of several competing interests . . . there is the defendant's constitutionally protected interest in a fair trial [and] [o]n the other side there is the 'powerful and legitimate interest in punishing the guilty.'" Response at 11. Standby counsel do not view these considerations (fair trial and punishing the guilty) as competing interests subject to balancing. Rather, the former is a constitutionally mandated predicate to the latter. The accused is presumed innocent until he is found guilty following a fair trial. However, the prosecutors seem to be suggesting that the defendant's right to a constitutionally guaranteed fair trial is not absolute. It is only a goal or an interest to be "balanced" against other governmental interests and goals.

over how his defense is presented at trial. *See McKaskel v. Wiggins*, 465 U.S. 168, 178 (1984) ("[T]he *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right."). Consequently, Mr. Moussaoui cannot receive a fair trial unless he is either granted access to the classified information at issue or is effectively forced to yield his *pro se* status, the essence of which is control over his defense, to standby counsel in deference to national security.

The government argues that there is no issue here because Mr. Moussaoui waived any right he might have to classified information at the time he exercised his *Faretta* right. Response at 7 (referring to the Transcript of the June 13, 2002 hearing at 35). At the outset, standby counsel have serious reservations as to the validity of that waiver.[8] More importantly, standby counsel have proceeded in this particular instance beyond a mere review of classified discovery information looking for possible *Brady*, a chore that the Court and the government no doubt anticipated cleared standby counsel would undertake for the uncleared defendant. We are now talking about how information the Court has already determined to be *Brady* information under CIPA § 6(a) is to be presented to the trial jury under CIPA § 6(c). Participation in this process

[8] The waiver was not knowing because throughout the colloquy intended to determine if Mr. Moussaoui's waiver of the right to counsel was knowing and voluntary, the defendant was operating under the false belief that he had the keys to his release in his pocket if he could get only five minutes of the Court's time to look at them. *See Motion in Support of Defendant's Requests for Access to Evidence, Access to Secure Website and for a Continuance* at 2, n.2 (filed Aug. 7, 2002 (docket #396). Further, it was not voluntary because it was predicated on a false belief, whether the product of mental disease or defect combined with cultural factors or cultural factors alone, that standby counsel were trying to kill him. Operating under such mortal fear, a defendant might waive many things, but it would be hard to consider any such waiver to be "voluntary."

is a quintessential function of trial counsel and here that counsel is Mr. Moussaoui.[9] Standby counsel, while participants in the event they might have to try the case, are simply not adequate substitutes for Mr. Moussaoui at this stage of the proceeding.

The government can point to no CIPA case where a substitute for *Brady* information was litigated under CIPA § 6(c) with trial counsel excluded both from the process and from seeing the underlying classified *Brady* information. Nor can the government point to any case where a *pro se* defendant had to forgo his right to see *Brady* information as the price of representing himself, even if the *Brady* was classified.

The government cites two district court cases, *United States v. Bin Laden*, 2001 WL 66393 at *2-4 (S.D.N.Y. 2001) and *United States v. Rezaq*, 156 F.R.D. 514, 525 (D.D.C. 1994), *vacated in part on other grounds*, *United States v. Rezaq*, 899 F. Supp. 697 (D.D.C. 1995), for the proposition that a defendant without a clearance may be barred from access to classified materials and proceedings involving them. Response at 6-7. But, in neither of these cases was the defendant acting *pro se*. Indeed, the rationale in *Bin Laden* for excluding the uncleared defendant from access to classified information was that his counsel, who was representing him and was trial counsel, would have access to the classified information and the ability to use its

---

[9] The Fourth Circuit has recognized that "the *Faretta* right . . . is not absolute, and 'the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.'" *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000) (quoting *Martinez v. Court of Appeal Cal.*, 528 U.S. 152, 162 (2000)). However, the government has not suggested that national security is one of those governmental interests that could outweigh the defendant's interest in acting as his own lawyer and has indeed supported Mr. Moussaoui's right to act in a *pro se* role throughout these proceedings. Having done so, it cannot complain when fulfillment of Mr. Moussaoui's *pro se* role conflicts with the demands of national security. Indeed, because of the government's position on his *pro se* right, it is national security that must yield.

fruits during trial of the case. But here, Mr. Moussaoui is the lawyer. While standby counsel may be able to be of assistance in initially reviewing classified discovery, we have now reached the point where this alternative becomes inconsistent with a *pro se* defendant's role as his own lawyer. This is because it is the *pro se* defendant who decides "the organization and content of his own defense." *McKaskle*, 465 at 174. This is also why the Government's reference to *United States v. Walker-Lindh*, 2002 WL 1974284 (E.D. Va. 2002), *see* Response at 10, is inapposite. Walker-Lindh had counsel.[10]

Nor does the government's paraphrase of a Seventh Circuit case, *United States ex rel. George v. Lane*, 718 F.2d 226, 233 (7th Cir. 1983) and several other cases cited by the government in a footnote, *see* Response at 7, n.3, provide any authority for the proposition that a defendant can be required to waive his right to see *Brady* information by opting to go *pro se*. Those cases are law library access cases, holding that standby counsel can act as proxy for a *pro se* defendant for purposes of legal research. Of course "[w]hen an accused manages his own defense, he relinquishes . . . many of the traditional benefits associated with the right to counsel." *Faretta*, 422 U.S. at 835. Access to unlimited legal research facilities by an incarcerated *pro se* defendant, the issue in *Lane*, is clearly one of those "traditional benefits" that fall under the umbrella of the right to the assistance of counsel, a right Mr. Moussaoui did waive. None of the cases cited by the government, however, suggest that Mr. Moussaoui, by going *pro se*, waived access to *Brady* information, particularly for purposes of determining how it is to be presented at

---

[10] The Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C.A. §§ 1801-1811, and the cases cited in the Response at 7, n.4, are also inapposite. *Ex parte*, in camera determinations are the rule and disclosure and adversary proceedings are the exception under FISA. *United States v. Squillacote*, 221 F.3d 542, 554 (4th Cir. 2000).

trial. This is information necessary not only for him to perform his role as the master of his own defense, but also for him to have a fair trial, a right he did not and cannot waive.

The Due Process Clause of the Fifth Amendment guarantees to every defendant the fundamental right to a fair trial. *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967); *see also In re Murchison*, 349 U.S. 133, 136 (1955) (stating that "[a] fair trial in a fair tribunal is a basic requirement of due process"); *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) (describing the right to a fair trial as "fundamental"); *Mayberry v. Pennsylvania*, 400 U.S. 455, 464-65 (1971) (noting that "the concern of due process is with the fair administration of justice"). This right is "the most fundamental of all freedoms . . . [and] must be maintained at all costs." *Estes v. Texas*, 381 U.S. 532, 540 (1965). As Justice Frankfurter has noted, "the denial of [a fair trial] is repugnant to the conscience of a free people. [It is among those rights that] express those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions', and are implied in the comprehensive concept of 'due process of law'." *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring in part) (citations omitted).

As such, the right to a fair trial cannot be waived by a criminal defendant. *See United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (agreeing with the premise that a "'guarantee [to] fair procedure'" "cannot be waived," and noting that there even "may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discredit[ing] the federal courts'") (citations omitted);[11] *accord*

---

[11] The Court in *Mezzanatto* also cited approvingly to this statement in *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir.), *cert. denied sub nom., Soteras v. United States*, 471 U.S. 1055 (1985):

(continued...)

United States v. Farhad, 190 F.3d 1097, 1105 (9th Cir. 1999) ("There is, as yet, no authority for the proposition that the Fifth Amendment right to a *fair* trial can be waived by a defendant.") (Reinhardt, J., concurring specially), *cert. denied*, 529 U.S. 1023 (2000).

Waiver of fair trial rights is prohibited not only because the right to a fair trial safeguards the interests of an individual defendant, but also because everyone involved in the criminal justice system and society at large has a stake in ensuring that the innocent are not punished and the guilty are not punished more than they should be. *See Wheat v. United States*, 486 U.S. 153, 160 (1988) (declining to permit waiver of conflict-free counsel, saying that "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them" and that "[n]ot only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation"); *see also Estes v. Texas*, 381 U.S. 532, 557 (1965) (observing that the purpose of a criminal trial "is to provide a fair and reliable determination of guilt").

If Mr. Moussaoui is to have a fair trial and control over his own defense which is at the core of his *Faretta* right, he must have access to *Brady* information and the right to meaningfully participate in proceedings to determine how that evidence will be presented in his defense.

---

[11] (...continued)

> No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept.

See Mezzanatto, 513 U.S. at 204.

Mr. Moussaoui must be given the essential information necessary for him to participate fully in any CIPA § 6(c) hearing.

B. Mr. Moussaoui Has A Right To Information Concerning The Prosecution's Theory Voluntarily Disclosed In An Effort To Defeat A Defense Motion

Mr. Moussaoui learned from this Court's redacted and declassified Memorandum Opinion that the government adopted a fifth plane into the White House theory to oppose his motion for access to classified *Brady* information. While there is only a passing reference to this theory in the redacted and declassified version of the transcript of the January 30 hearing, the discussion was much more extensive in the unredacted transcript. Mr. Moussaoui moved for an unredacted transcript so that he could be advised of any additional details disclosed by the prosecution at the hearing which was closed to him. It is unclear whether the redaction of information concerning this theory arises from a legitimate need to protect national security information or merely from an inconsistency in the redaction process. Moreover, standby counsel cannot fill the knowledge gap for Mr. Moussaoui, even though they have access to the transcript and attended the January 30 hearing, because they cannot communicate what now appears to be classified information to the uncleared defendant.

The government glides by the fact that it voluntarily disclosed its fifth plane to the White House prosecutive theory as a tactical choice at the January 30 CIPA hearing to try to defeat a defense motion by Mr. Moussaoui. Obviously, the government's theory of the case cannot be classified. Further, under ordinary circumstances, Mr. Moussaoui would have had a right to be present at any hearing where the government opted, for tactical reasons, to voluntarily disclose its theory. A defendant has a right to be present at any "stage of the criminal proceeding that is

critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). More specifically, a defendant has a constitutional right to be present at all proceedings "'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'" *Id*. (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)). Thus, "'to the extent that a fair and just hearing would be thwarted by his absence,'" a defendant must be allowed to be present. *Stincer*, 482 U.S. at 745 (quoting *Snyder*, 291 U.S. at 108).[12]

Moreover, because the right to be present is rooted in both the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment, *United States v. Gagnon*, 470 U.S. 522, 526 (1985), it extends to situations "where the defendant is not actually confronting witnesses or evidence against him." *Id*; *accord Faretta v. California*, 422 U.S. 806, 816 (1975) (stating that "the accused [has] a right to be present at all stages of the proceedings where fundamental fairness might be thwarted by his absence"); *see also* Fed. R. Crim. P. 43.[13]

---

[12] As one of the foremost scholars of criminal law has summarized:

> In determining whether the right extends to a particular proceeding apart from the trial itself, the Supreme Court has looked to the function of the right as it relates to the content of the particular proceeding in the individual case. In particular, the Court has examined whether or not exclusion of the defendant interfered with the defendant's opportunity to test the evidence introduced against him, and whether or not it otherwise affected his opportunity to defend himself at trial.

Wayne R. LaFave, *et al.*, Criminal Procedure 456 at § 24.2(a) (2d ed .1999).

[13] The "protective scope" of Rule 43 of the Federal Rules of Criminal Procedure is actually broader than that of the Fifth and Sixth Amendments. *United States v. Camacho*, 955 F.2d 950, 953 (4th Cir. 1992) ("Rule 43 has traditionally been understood to codify both a (continued...)

Thus, for example, it has been recognized that a defendant has a right to be present for the taking of testimony whether by the prosecution or the defense, the presentation of the defense case, and the impaneling of the jury. *See, e.g., United States v. Camacho,* 955 F.2d 950, 953 (4th Cir. 1992) (right to be present for impaneling of the jury and the direct examination of a prosecution witness), *United States v. Novaton,* 271 F.3d 968, 998 (11th Cir. 2001) (right to be present for examination of prosecution and defense witnesses and the presentation of the defense case), *cert. denied*, 535 U.S. 1120 (2002).

Obviously, there are exceptions to this general requirement, but these exceptions are much narrower when the defendant, as here, has exercised rights under *Faretta* and is, therefore, acting in a *pro se* capacity. For example, while a defendant not acting *pro se* may properly be excluded from a conference where counsel and the court are discussing issues which are purely questions of law, *see* Fed. R. Crim. P. 43 (b)(3), it would not be appropriate to exclude a *pro se* defendant from such a hearing. A *pro se* defendant makes his own motions and argues his own points of law. *McKaskle,* 465 U.S. at 174. To exclude a *pro se* defendant in such circumstances is to, in effect, conduct an *ex parte* proceeding.

Here, Mr. Moussaoui was excluded from the January 30 hearing because he lacks a national security clearance. If present, he would have learned of the government's "new" fifth plane to the White House theory. While we preserve our objection, which we have maintained from the outset, to procedures which exclude a *pro se* defendant from CIPA hearings, the rationale for the exclusion has never been to deny the defendant access to information tactically

---

[13] (...continued)
defendant's constitutional right and his common law right to presence. Accordingly, its 'protective scope' is broader than the constitutional right alone.").

advanced against him in an effort to defeat his motions. This is using CIPA as a sword instead of a shield. Accordingly, the defendant should be granted immediate access to the information at pages 21-26 and 62-64 of the January 30, 2003 hearing transcript concerning the government's fifth plane to the White House theory.

CONCLUSION

We have previously questioned whether a *pro se* defendant who maintains his innocence can ever waive his right to *Brady* material, and in turn the right to a fair trial, or his right to be present when acting *pro se* at procedurally significant stages of his case. *See Motion for Access by Defendant to Classified and Sensitive Discovery and for Relief from Special Administrative Measures Concerning Confinement at 4-13* (filed June 7, 2002) (arguing that Mr. Moussaoui cannot waive his rights under the Fifth and Sixth Amendments to receive a fair trial, receive exculpatory evidence, present a defense, confront witnesses, and be present at critical stages of the proceedings). Unless there is a national security exception to *Faretta*, the defendant, as counsel, has a right to see the *Brady* information, whether classified or not, so that he can make a meaningful comparison with any proposed substitute and he has a right to be heard when substitutes are proposed and argue as to whether the substitute is an equivalent – something he can only do if he is allowed to see the original classified information, the substitute, and participate in the hearing. He also is entitled to know what the government has voluntarily disclosed about its theory of the case so that he can make use of that information in CIPA § 6(c) proceedings and in subsequent proceedings in this case.

ZACARIAS MOUSSAOUI

Standby Counsel

/S/
Frank W. Dunham, Jr.
Federal Public Defender
Gerald T. Zerkin
Senior Assistant Federal Public Defender
Kenneth P. Troccoli
Anne M. Chapman
Assistant Federal Public Defenders
Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0808

/S/
Judy Clarke
Federal Defenders of
San Diego, Inc.
255 Broadway, Suite 900
San Diego, CA 92101
(703) 600-0855

/S/
Edward B. MacMahon, Jr.
107 East Washington Street
P.O. Box 903
Middleburg, VA 20117
(540) 687-3902

/S/
Alan H. Yamamoto
108 N. Alfred Street
Alexandria, VA 22314
(703) 684-4700

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Standby Counsel's Reply to Government's Response in Opposition to Defendant's *Pro Se* Pleading Entitled "Redaction to Coverup Their Lies" was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and UPON APPROVAL FROM THE COURT SECURITY OFFICER via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 24th day of April, 2003.

/S/
Frank W. Dunham, Jr.